BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ERICA STOLL	)	
Claimant	)	
	)	
VS.	)	
	)	
SOUTHEAST KANSAS COMMUNITY	)	
ACTION PROGRAM	)	
Respondent	)	Docket No. 1,039,269
	)	
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the August 10, 2011 Award by Administrative Law Judge Thomas Klein (ALJ). The Board heard oral argument on November 2, 2011. E.L. Lee Kinch, of Wichita, Kansas, was appointed as a Pro Tem Board Member in this matter in place of former Board Member, Julie A.N. Sample.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties stipulated at oral argument to the Board that the preliminary hearing transcript of December 23, 2009 is part of the record minus any medical hearsay contained in the exhibits.

ISSUES

The ALJ limited claimant's award to the medical treatment already provided and denied any further compensation after finding that claimant suffered no permanent impairment as a result of her work-related accident on December 17, 2007.

Claimant requests review of whether she sustained a permanent impairment as a result of the work injury and the nature and extent of her disability. Claimant argues that she is physically permanently and totally disabled due to the chemical exposure arising out of and in the course of her employment on December 17, 2007. In the alternative, claimant argues that she has a 10 percent permanent partial impairment to the body as a whole on a functional basis, with a 73 percent work disability from March 2008 through July 2010, a 77.5 percent work disability from August 2010 through October 2010, and an 81 percent work disability from October 2010 and ongoing.[1]

Respondent argues that claimant failed to sustain her burden of proving permanent impairment arising out of and in the course of her employment allegedly due to a brief period of exposure to chemicals. Therefore, the ALJ's Award should be affirmed and claimant limited to the medical treatment already provided.

FINDINGS OF FACT

Claimant, a 33 year-old wife and mother of a 3 year old child, is a high school graduate and has taken courses through the University of Phoenix and Everest Online. She has completed 72 hours in pursuit of a degree in Criminal Justice.

Claimant began working for respondent, Southeast Kansas Community Action Program (SEK-CAP), a program that offers Headstart classes in Southeast Kansas in 2007.

Claimant has been on Social Security Disability since 2002 because of degenerative joint disease in her back. She admits that her back doesn't affect her at all, but she applied for the disability benefits back in 2002 because "eventually my back, I will be in a wheelchair eventually with my back".[2] To protect her back, claimant testified that her doctor told her not to lift over 5 pounds. She had been receiving Medicare since 2004 and Medicaid since March 2008.

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[1] These different work disabilities are meant to reflect the varying wage loss percentages claimant has had since the accident combined with Dr. Murati's 62.5% task loss opinion. (83% loss March 2008 to July 2010, 92.5% loss August 2010 to October 2010 and 100% loss October 2010 forward).

[2] Claimant's Depo. at 7.

Claimant testified that she started a daycare out of her home in 2005 and it was in business when school was not in session. She ran the daycare until August 2007 when school began and she went to work for respondent as a cook. She testified that she did a little bit of everything for respondent. She did grocery shopping, cooked food, cleaned tables and cleaned restrooms. When the school year was over, claimant again opened the daycare. She provided breakfast and lunch for the children who attended the daycare, including her son, and entertained the kids by playing board games with them. She did not lift the children because since the accident lifting causes her to have problems breathing.

On December 17, 2007, claimant was working at Headstart in Iola. Claimant testified that the morning classes had just let out and she was preparing to clean the restrooms. She went to the locked supply closet and pulled out a bottle of cleaning solution and went to spray down everything that needed to be cleaned. As the claimant was spraying everything she noticed a strong fume of bleach. Claimant testified that she had breathed in the strong fumes and immediately felt pain in her lungs.[3] Claimant claims problems breathing each and every day since this incident. She denies any prior problems with her breathing. She testified that the mixture used for cleaning had been prepared by someone else. Claimant later found out that one of her co-workers made the cleaning mixture with one half bleach and one half water, instead of the normal one to 10 mixture.[4]

Claimant reported this incident to her boss, Kristen Michaels, and testified that she was told to open the back door and put a fan out the back window until the building aired out because, apparently, the smell was so strong it spread from the bathroom throughout the rest of the building.[5] Claimant stayed for the afternoon class. Claimant completed her shift, but during her shift she continued to be dizzy and had problems breathing. She asked Ms. Michaels if she could see a doctor and was told to make an appointment, which claimant did with her family physician Dr. Robert Thomen for the next day. An accident report was filled out.[6] Claimant testified that when she met with Dr. Thomen he told her that she had chemical inhalation and prescribed a steroid and an Albuterol inhaler. Neither of these things helped, and she was then prescribed Advair, which claimant reported helped with the dizziness, but she still had some shortness of breath.[7]

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[3] R.H. Trans. at 12.

[4] P.H. Trans. at 12-13.

[5] Claimant's Depo. at 21.

[6] *Id.* at 23-24.

[7] *Id.* at 25.

Claimant's counsel sent her to see Dr. Pedro Murati, who recommended additional treatment. The ALJ sent her to see Dr. Daniel Doornbos, who told her she needed to see a specialist.[8]

Claimant continued to work for respondent while she was receiving treatment with Dr. Thomen. But she had difficulty performing her job because she was having difficulty breathing, standing and walking.

Claimant continued to be seen for shortness of breath, and was prescribed Spiriva and Symbicort. These medications are used to treat pulmonary problems.[9] Claimant was diagnosed with Chronic Obstructive Pulmonary Disease (COPD) in April 2008. She was told by her doctor that the chemical inhalation on December 17, 2007 was the cause of this condition for the claimant.[10]

Claimant suffered another injury while working for respondent. She testified that on February 27, 2008, she was burned while straining a pan of noodles. She testified that as she had the pan lifted to pour the noodles into a strainer, one of the kids flung open the door to the kitchen and it hit the island, startling her and she jolted and the hot water splashed up onto her stomach. She reported this incident and was told to put some aloe vera on the burn. She did and then went back to her work duties. The aloe vera did not help and claimant got permission to go to the doctor who prescribed Silvadene, which helped.[11] Claimant was told to take Tylenol for the pain which she describes as being a 7 on a scale of 10. No other treatment was recommended. But she would like additional treatment. Claimant testified that the burn keeps her from bending over or picking things up off the floor.

Claimant quit her job in March of 2008, because she could no longer keep up with the physical demands of the job.[12] She left a note for her supervisor, Ms. Michaels, on March 5, 2008 informing her that she was quitting.

In April 2008, claimant again started her daycare business Heaven's Little Angels out of her home. Claimant operated this daycare business with her husband until October

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[8] Although the ALJ sent claimant to Dr. Doornbos for a court-ordered IME, the doctor apparently believed respondent hired him, thus his opinion cannot be considered neutral.

[9] *Id.* at 26.

[10] *Id.* at 27.

[11] *Id.* at 30-31.

[12] R.H. Trans. at 17.

2010 when the physical demands became too much for her, and they closed the business.[13] In 2009, claimant's gross income was $13,654 from the daycare business.

In May 2008, claimant obtained a job working for Chanute Health Care Center for 8 days in the housekeeping department. She made $7.25 an hour for 8 hours a day, 5 days a week.[14] ($7.25 x 64 = $464.00 for 8 days of work.) Claimant quit this job after meeting with her attorney. She denies saying that she had to quit because it didn't look good for her to be fully employed.

Claimant has been receiving Social Security Disability since 2002 because of a series of medical conditions (degenerative joint disease in her back and she only has one kidney).[15] She testified that she has paid for part of her medical treatment and Medicare has paid for part.[16]

Claimant's condition continued to get worse and by the time she met with Dr. Doornbos on September 25, 2008, she could hardly breathe. And she developed a problem with her vocal cords which left her with a raspy voice. Claimant also reported that she can only stand for 10 minutes before she gets lightheaded and is short of breath, and can only walk 20-30 steps before she needs to sit down. She has no problems sitting. She reported having trouble sleeping and having to sleep in a recliner in an upright position to be able to breathe.[17] Claimant testified that her husband tells her she sometimes stops breathing during the night and this was confirmed with a sleep study. Claimant contends that she did not have problems sleeping before she inhaled the chlorine fumes.[18]

A typical day for the claimant is getting up at 5:00 am, having a breathing treatment, getting her son up and off to school, going back to lay down for a few hours, getting back up for another breathing treatment, making and eating lunch, watching tv for a while and then laying back down for a while. When she gets up from this second nap she works on her homework and then rides with her husband to pick up their son from school. She then helps her son with his homework and has another breathing treatment while her husband cooks dinner. After that, claimant goes online for her classes, then takes her medications,

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[13] *Id.* at 20.

[14] *Id.* at 32-33.

[15] *Id.* at 39.

[16] *Id.* at 20.

[17] *Id.* at 25-26.

[18] *Id.* at 26.

has another breathing treatment and goes to bed.[19] Claimant's medications are an Abuterol inhaler, an Advair inhaler, a Symbicort inhaler, Spiriva, Levaquin and Topamax. Everything but the Topamax is for claimant's breathing problems.

Claimant testified that since December 2007 she has gained probably 50-60 pounds because of her sedentary lifestyle due to the accident. She does try to watch what she eats, but is unable to do a lot of physical activity. Before the accident claimant was considered to be obese and with the weight gain she is still considered obese. Claimant is 5 foot 5 inches tall, 270 pounds. She is currently not working because of her breathing problems.[20]

By March 2010, claimant's condition worsened to the point that she changed physicians and began seeing Dr. Parham in Chanute, Kansas. Claimant was also referred to Dr. Reussner, a pulmonologist. Claimant is being treated with two inhalers and a nebulizer 3 to 4 times a day.

Prior to working for respondent, claimant worked for Montgomery County Detention Center as a Detention Officer. She worked the overnight shift and did bed checks to make sure the inmates were accounted for. Claimant had no injuries during her time there.

Claimant testified that she has only filed two workers compensation claims both with respondent. Her medical history includes a hospitalization in 2005 for renal cell cancer which resulted in the loss of one of her kidneys.[21] Claimant is not on dialysis, does not have to take any cancer medication and is in remission.

Claimant testified that she has also seen a chiropractor for problems related to the degenerative disease in her back. On a scale of 1 to 10 claimant rates this back pain at a 9 when she bends. She was not prescribed anything for this pain. Claimant was involved in a motor vehicle accident in 1987, she was not injured. Claimant has problems cleaning, lifting, being around chemicals and performing any kind of yard work.

Currently, claimant sleeps in a recliner, has shortness of breath, wheezes, and gets headaches. She can only walk 20 steps before she is out of breath and she can only stand for 10 minutes before becoming out of breath. Claimant testified that these issues have made her unable to maintain employment. And without her medication she wouldn't be

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[19] *Id.* at 28-29.

[20] *Id.* at 50.

[21] Claimant's Depo. at 37.

able to function.[22] Claimant testified that her condition has continued to get worse since the incident.

Claimant met with Daniel Doornbos, M.D., a physician board certified in pulmonology, internal medicine and critical care, on September 25, 2008 for an IME. Claimant's chief complaints at the time were cough, shortness of breath and weezing. A history was taken and claimant was examined. Dr. Doornbos diagnosed claimant with possible asthma or reactive airway dysfunction syndrome. He opined that the claimant's morbid obesity led to acid reflux, which led to her coughing, which caused her vocal cord dysfunction. Further testing and treatment were recommended.

Claimant met with Dr. Doornbos for another examination on May 15, 2009. Dr. Doornbos determined that claimant was in need of ongoing medical treatment for her respiratory problems, but did not attribute her ongoing problems to the exposure at work.

Dr. Doornbos did not assign any permanent restrictions because when he met with claimant she was not yet at maximum medical improvement. Additionally, because claimant didn't follow through with his therapy recommendations it would be difficult for him to assign a degree of disability based on the assumption that the claimant was as good as she was going to get. The doctor did not feel that claimant's problems were a result of her exposure which could have caused a temporary worsening of her physical symptoms, but did not lead to a permanent impairment.

Dr. Doornbos testified that the claimant didn't volunteer a prior history of asthma or pneumonia before the exposure.[23] She did come to the examination with a diagnosis of COPD. He said claimant had a lot of medical problems for someone who was only 30 years old

Dr. Doornbos opined that claimant should be evaluated by an ear, nose and throat specialist since her main problem was vocal cord dysfunction. He opined that the factors that contributed to claimant's shortness of breath are claimant's obesity[24], her reflux into her throat, and her vocal cord dysfunction.[25] He went on to state that it is possible for someone with physical problems to have a reaction from a chemical exposure with perfumes, smoke smells or chemicals. Claimant indicated that she has to use natural cleaning products that don't have a lot of scent in her home.

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[22] P.H. Trans. at 16.

[23] Doornbos Depo. at 27.

[24] Claimant was considered to be obese before the exposure.

[25] Doornbos Depo. at 42.

Dr. Doornbos was willing to say that it was likely that claimant had a temporary irritation of her airways by breathing in the chemicals. But with the persistence of the irritation over months, it is his opinion that the cause of a permanent condition is more related to claimant's untreated reflux.[26]

Claimant met with Dr. Pedro Murati at the request of her attorney, on April 14, 2008, for an examination and treatment recommendations. Claimant's chief complaints were shortness of breath and painful breathing, wheezing, coughing, major headaches and itching on the stomach where she had a burn. Dr. Murati examined the claimant and her records and opined that she was status post chemical exposure, and status post burn with a mild 2nd degree burn and blistering, approximately the size of a half dollar, to the abdomen.[27] During the examination, claimant advised Dr. Murati that she was working for Chanute Health Care and had been there for about one month, working as a housekeeper.

Claimant gave no history of breathing problems before December 17, 2007, therefore Dr. Murarti determined that his diagnoses were within a reasonable degree of medical certainty a direct result of claimant's December 17, 2007 work-related chlorine inhalation and February 27, 2008 work-related incident during her employment with respondent. He recommended claimant be evaluated by a pulmonologist and undergo a pulmonary function test.[28]

Claimant had a pulmonary function test on September 24, 2008, which revealed mild obstructive ventilatory defect with borderline significant reversibility after bronchodilators, normal lung volumes, mildly reduced diffusion capacity, not corrected for hemoglobin with a normal DL/NA ratio.[29] And according to Dr. Doornbos, claimant has a mild degree of asthma as a preexisting mild condition or possibly reactive airway dysfunction syndrome.[30]

Claimant saw Dr. Murati for another examination on March 4, 2010. At that time, claimant complained of having trouble breathing, shortness of breath when walking across the house, inability to sleep flat and bad snoring since the accident.[31] The purpose of this visit was for the doctor to determine what impairment rating was appropriate due to the

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[26] *Id.* at 53.

[27] Murati Depo., Ex. 2 at 1 (Dr. Murati's Apr. 14, 2008 IME Report).

[28] *Id.*, Ex. 2 at 2 (Dr. Murati's Apr. 14, 2008 IME Report).

[29] *Id.* at 15.

[30] *Id.* at 15.

[31] *Id.*, Ex. 3 at 1 (Dr. Murati's Mar. 4, 2010 IME Report).

chemical exposure. Dr. Murati assigned claimant a 10 percent whole person impairment, pursuant to the AMA *Guides*, 4th ed.

Dr. Murati went on to assign permanent work restrictions of working as tolerated using common sense and to avoid chemical exposure, volatiles, and organic compounds such as bleach, ammonia, alcohols, air fresheners, and anything else she can smell.[32] He opined that inhaling chlorine essentially kills lung tissue.[33]

Claimant was seen again by Dr. Murati on November 1, 2010. At that time, she complained of difficulty working without losing her breath, inability to perform strenuous activities or pick up her son without shortness of breath, weezing, occasional headaches, breathlessness from walking too far and occasional stopping of breathing while sleeping.[34]

Dr. Murati opined that the claimant had COPD[35] as a result of the chlorine inhalation in December 2007. Claimant's work restrictions and impairment rating remained the same. Dr. Murati recommended that the claimant lose weight.

Dr. Murati reviewed the task list prepared by Karen Terrill and opined that the claimant can no longer perform 30 out of 48 previous tasks for a 62.5 percent task loss.[36] He indicated that it wasn't that the claimant couldn't physically perform these tasks, but that she shouldn't because she runs the risk of worsening her COPD.[37] He also agreed with the assessment by Ms. Terrill that the claimant would be unable to engage in any substantial gainful employment and therefore is permanently and totally disabled on the assumption that she would need to be completely able to control her own environment.[38] Based solely on claimant's pulmonary function test her condition is getting better, but her symptoms are still pretty bad.

Claimant met with vocational specialist Karen Terrill by telephone on April 13, 2009, for a vocational assessment. Ms. Terrill determined that the claimant is unable to secure

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[32] *Id.*, Ex. 2 at 3 (Release to return to work dated March 4, 2010).

[33] *Id.* at 11.

[34] *Id.*, Ex. 4 at 1 (Dr. Murati's Apr. 14, 2008 IME Report).

[35] Dr. Parham diagnosed claimant with COPD on April 26, 2010.

[36] Murati Depo. at 30.

[37] *Id.* at 29.

[38] *Id.* at 27-28.

employment outside of her home operated daycare center based upon her restrictions.[39] Ms. Terrill did not believe that the claimant would be able to control her own environment in the open labor market because at any point she could be exposed to a perfume or cologne or air freshener that could aggravate her symptoms.[40]

Ms. Terrill also testified that the $162.65 per week that claimant made before expenses from her daycare business was not considered substantial gainful employment by the Social Security Administration, who considers $910 per month or a little higher to be substantial gainful employment.[41] Ms. Terrill testified that her opinion that the claimant is unemployable does not apply to the opinions of Dr. Doornbos because he didn't assign any restrictions.

Vocational specialist Steve Benjamin interviewed claimant by telephone on May 19 and 20, 2010, and completed a vocational assessment of the claimant. As a result, he opined that claimant is capable of working. At the time of the assessment, claimant was working for herself in her in-home daycare making $7.20 an hour. Claimant was also receiving $877 in Social Security Disability with $100 of that going to pay for Medicaid. However, Mr. Benjamin testified that because she was receiving Social Security her daycare job was considered less than substantial and gainful.[42]

After speaking with Deann Miller, Human Resource Manager for respondent, Mr. Benjamin opined that claimant would be able to return to work in her position at the time of the injury or a similar position and not have a wage loss. Mr. Benjamin relied on the medical records and opinion of Dr. Doornbos, because those were the only medical records he had.[43]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[44]

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[39] Terrill Depo., Ex. 2 at 2 (Ms. Terrill's Apr. 20, 2010 report).

[40] *Id.* at 20.

[41] *Id.* at 21-22.

[42] Benjamin Depo. at 25.

[43] *Id.* at 22-24.

[44] K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[45]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[46]

It has been stipulated that claimant suffered an exposure to chlorine bleach on December 17, 2007. The dispute centers around what permanent disability resulted from that exposure, if any. Dr. Murati determined that all of claimant's many ongoing breathing problems stemmed from this one time exposure. However, he was unable to identify the concentration of chlorine that claimant breathed. He also testified that claimant was physically incapable of working, finding her to be permanently and totally disabled. Yet, at the time he examined her on April 14, 2008, claimant said she was working as a housekeeper and had been doing this work for a month. Claimant continued to perform her housekeeping duties until May 8, 2008, when she terminated her job the day she met with her attorney. Claimant then testified that she had only worked as a housekeeper for 8 days, a fact contradicted by the medical records of Dr. Murati.

Claimant also testified that she was unable to pick up her child due to her ongoing breathing difficulties. Yet, by her own admission, she had been restricted from lifting over 5 pounds since 2002, due to an ongoing low back problem. Additionally, it is suspect that claimant continued to run a day care center until the Monday before her Tuesday October 25, 2010, regular hearing.

Finally, pulmonary expert Daniel C. Doornbos, M.D., a board certified expert in the field of breathing treatments, opined that claimant's condition was only temporarily aggravated from this brief exposure. The Board finds the medical opinion of Dr. Doornbos to be the most convincing in this record.

The ALJ found, and the Board agrees that claimant has failed to prove that she suffered a permanent impairment as the result of the chlorine exposure on December 17, 2007. The Award limiting claimant to the medical treatment already provided by respondent is affirmed.

CONCLUSIONS

[45] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[46] K.S.A. 44-501(a).

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated August 10, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge